No. 3273

IN EQUITY

United States
Circuit Court of Appeals
For the Ninth Circuit

MATHILDE CARDONER,

Appellant,

vs.

EUGENE R. Day, et al,

Appellees.

BRIEF OF HARRY L. DAY AND JEROME J. DAY, ANSWERING APPELLANT'S REPLY BRIEF.

Upon Appeal From the District Court of the United States, District of Idaho, Northern Division.

JAMES E. BABB,
Lewiston, Idaho,
Attorney for Harry L. Day.
ISHAM N. SMITH,
Wallace, Idaho,
Attorney for Jerome J. Day.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MATHILDE CARDONER,

Appellant,

vs.

EUGENE R. DAY, et al,

Respondents.

Brief of Jerome J. Day and Harry L. Day Answering Appellant's Reply Brief.

Appellant in a reply brief of approximately 85 pages, has made almost a total re-presentation of the case in chief, and a few matters in the reply brief not covered by brief of associate counsel seem to deserve attention, viz:

I.

The position of all the respondents, relating to findings of fact by Judge Dietrich, is set forth in the brief of associate counsel, and will not be repeated here.

II.

That particular knowledge of all the affairs of this partnership was open and accessible to Mrs. Cardoner as much as to Mr. Day. See our main brief pp. 117-122.

In Geddes Appeal, 80 Pa. St. 447, which was an action to rescind a sale of a partnership interest to a co-partner, the court speaking unanimously through Justice Paxson (Agnew, C. J., and Sharswood, Mercur, Gordon and Woodward concurring) said (. 461):

> "It is unnecessary to go over the allegations of concealment and misrepresentation in detail. In the absence of inadequacy of consideration, they are not especially significant * * * (. 462). "If Mr. Geddes was deceived, it was his own fault. He had the fullest access to the books. These books were his books; they belonged to the firm of which he was a member. No one ever denied him access to them. * * * It is not to the purpose that he did not understand them. He could have obtained the information from the bookkeeper. He had the means of information. * * * He cannot charge anyone else with the consequences whatever they may be of his own neglect."

At bar, Judge Dietrich says: (pp. 1388-1389):

> "It is not a case where the principal is at a distance and wholly dependent upon the information furnished him by his agent or associate, or is a stranger with no one to whom to turn for assistance or advice. The company's mill was within a few moments walk from the offices at Wallace, and the mine a few moment's ride upon the train or automobile. They were at all times accessible and open to the plaintiff; and so were the books and records of the company. Of this there is no question. She had agents at Wallace and she had acquaintances and friends. If she did not understand an item in one of the

> monthly statements, she could as readily and as reasonably have asked Allen for assistance, as in the case of of the Administrator's account; or she was abundantly able to employ services of that character. She had engaged counsel who was not only qualified to care for her interests in their legal aspects, but was also exceptionally familiar with the history and operation of the Hercules as well as other mines in the district. At intervals she was a guest at the house of the presiding judge at the state district court, at one time her attorney, who was also familiar with the history of the district, and in a general way with the various properties therein."

Other matters of her knowledge of the particular Coeur d'Alene district where this Hercules mine is located, of the neighboring mines, depth of probable ore bodies below the water level, character of ore bodies, mineral wealth and productiveness have been argued heretofore.

III.

CHANGE OF ATTITUDE.

At page 6—Point Two—page 9 Point Nine—pages 13 et seq. point III., of the reply brief, extended comment is made upon the pretense that respondents have changed their position in this case.

These arguments relate to the point made in our main brief that Mrs. Cardoner did not rely upon E. R. Day for information, pending this negotiation; that she had severed all confidential relations with him, hired her own agent, had taken advice from

her coowners and friends, and conducted an independent investigation concerning the advisability of sale, value and other matters.

This argument is not a change of our position. In the answers of Jerome J. Day and Harry L. Day, the question of *Reliance* by Mrs. Cardoner on E. R. Day is directly made an issue. But the issue on the points of her reliance on E. R. Day is quite distinctly marked. These defendants say:

> "(R. p. 143—bottom). Defendant is without knowledge allegation 6 p. 152.

Under that denial, the position taken is clearly within the issues and no new position is taken.

The law cited by us under point III p. 114, and the arguments advanced at pp. 80 to 125 are illuminated by the following quotations from the Reply brief of appellant at pages indicated, to-wit:

> "(P. 32-33) quoting from Ledington v. Patten, 86 N. W. 571 (581) quoting from Sec. 958 2 Pom. Eq. Jurisprudence, as follows:
>
> "'A trustee may buy from the cestui que trust provided there is a distinct and clear contract, ascertained to be such, etc.'
>
> "(p. 43, quoting from Pomeroy's Equity, Sec. 958,) 'There is, however no imperative rule of equity that a transaction between the parties is necessarily, in every instance voidable. * * * and especially if it appears that the beneficiary acted in the transaction upon the independent information and advice of some intelligent third person, competent to give such advice, then the

> transaction will be sustained by a court of equity."

Indeed, Plaintiff's conduct in having separate counsel during administration, appointing a new agent and serving notice of the appointment, shows she was in fact not depending on E. R. Day but acting independently of him and besides, she must have realized when she made her offer, that she had challenged his individual interest in conflict with her own, to some extent at least, as said in Elmore vs. McConaghy, 159 Pac. 108 (Wash.) where it was said:

> "Whatever fiduciary relation was imposed on the partners toward each other * * * ceased when they began to negotiate between themselves as to the price to be paid by one for the other's interest,"

and the court refers to vendors duty to have examined the books for himself.

In support of the same idea in Mallory vs. Leach 35 Vt. 156; 82 Am. 625, the court said:

> "If * * * confidence ceased to exist and alienation and distrust had taken its place, then it is obvious he could not have supposed she was relying upon his friendship and advice."

Notwithstanding the relation of husband and wife is the most confidential known, she is not in a position to claim reliance upon him after she has gone to his business associates criticising his business policy

and hires a lawyer in her own interest and appoints an agent and notifies her husband and others of her appointment of the agent and he takes over management of her affairs. She cannot claim the prior close confidence and that she as relying on it alone and have her agent and independent advice also.

IV.

And here we may note the distinction already pointed out that this sale was not made by the trustee to himself; nor is it one where he conducted the sale at all. This transaction (sought out and opened by plaintiff's offer) is between partners, each of whom is a sui juris, each having equal power of access to all the books and records of the company, the property of the co-partnership and to obtain all information which the other could have obtained from the various employes and assistants of the company of which each was a member.

Here, the trustee was not charged with the duty of selling, nor did he sell, nor did he institute the negotiations. Pertinent language discriminating between the facts here and those which are found in many cases cited by appellant's counsel is found in Golson vs. Dunlap, 14 Pac. 476 (Cal.) heretofore cited to-wit:

> *"Where the trustee is charged with the duty of selling the property and he does not deal directly with the cestui que trust* * * * and

whether he takes a conveyance directly to himself or acts through the intervention of a third person, the sale, although *not,* as a general rule, absolutely void (Blockley v. Fowler 21 Cal. 329; Boyd v. Blankman 29 Cal. 19,) is avoidable at the election of the cestui qui trust, (Blockley v. Fowler, 21 Cal. 329; Guerrero v. Ballerino 48 Cal. 118; Tracy v. Colby, 55 Cal. 71.) without reference to the adequacy of the price, (San Diego v. Railroad Co., Cal. 100; O'Connor v. Flynn, 57 Cal. 293.) These decisions are in accordance with the great preponderance of authority elsewhere. * * *

"The distinction between the above class of cases and those in which the trustee purchases directly from cestui qui trust, although not always observed, has been frequently pointed out. See Lewin Trusts, 463; Pom. Eq. Jur. Sec. 957; Ex parte Lacey 6 Ves. 626; Cowee v. Cornell, 75 N. Y. 100; Brown v. Cowell 116 Mass. 465."

In this latter class of cases inquiry will be made into the fairness of the transaction, and under proper conditions it will be sustained"

The fiducial duties of E. R. Day did not involve his sale of Mrs. Cardoner's property nor was he ever the holder of the legal title. We believe the discussion heretofore made in our original brief answers the elaborate argument of appellant upon this branch of the case.

V.

Even if Sec. 5543 R. C. of Idaho were applicable and even if it had declared sale "void" as did the Oregon statute. opinion of Hunt J. Mu. Ben. Life Ins.

Co. v. Winne 49 Pac. 446 (Mont.) supports that of Gilbert, Circuit J. in Mills v. Mills 57 Fed. 873 (Orig. Brief p. 76) in holding that "void" as thus used means only "voidable." See also Cole v. Stokes 113 N. C. 270; 18 S. E. 321.

VI.

VALUE.

Again, appellant argues at length, the alleged value of this property.

We have pointed out that appellant contends that Mrs. Cardoner was entitled to the full estimated probable and prospective value, based upon calculations of supposed ore bodies, to the end of the mine's supposed life.

The Supreme Court of California says in

GOLSON V. DUNLAP 14 Pac. 576 (579):

> "It is proper to say for the guidance of the court below upon a re-trial, that it is not the highest possible price that must be taken as a standard, but the fair reasonable value of the property. Speaking of transactions with expectant heirs and reversioners, a class of whom, on the grounds of public policy, the greatest protection is afforded, (compare 1 Perry, Trusts, Sec. 188) Judge Story says: "It is not necessary to establish in evidence that the full value of the reversionary interests or other expectance has been given according to the ordinary tables for calculations of this sort. It will be sufficient to make the purchase unimpeachable if a fair price, or the fair market price, be given therefor at the time of the dealing.' 1

Story Eq. Jur. Sec. 336."

As remarked in the foregoing extract, the time to be taken is the time of the deal. A subsequent advance is not to be regarded. In the leading case of Fox v. Mackreth, 1 Lead Cas. Eq. 115, Lord Thurlow would not give any weight to the consideration that the trustee happened to sell at an advanced price, saying: 'The money would be due not in consequence of what Maskreth afterward sold it for but what Fox lost by it at the time.' So, in Coles v. Tretcothick, 9 Ves. 246, where the trustee had subsequently sold for a greater sum, Lord Eldon said: 'Inadequacy of price does not depend upon a person giving a pretium affectionis from any particular motive, beyond what any other man would give—the reasonable price * * *

Accidental subsequent advantage made of a bargain is nothing. * * * The fair value at the time under all circumstances must be the criterion."

Briefly recapitulating the facts here, they show that the contract was not made until after the estate had been delivered to the heir, the final decree had been rendered and filed and recorded, the final report approved and the purchaser had refused to pay more than his offer, and told the agent of the seller that he "was done," to "offer it to anybody else he wanted to." Such statement was made after the threat to sell out to the known rivals of the Days, who were financially strong and who were believed by Mrs. Cardoner (if her complaint is true) to be able to smash the Days.

The sale was an undivided one-sixteenth (1-16)

interest, and $320,000.00 of the consideration was paid in November, after the technical discharge of the administrator had been finally entered.

Appellant's counsel urge the profits in the war period of 1916, showing an inadequacy of price; *but Mrs. Cardoner received her* 1-16th *of those profits up to October* 1*st,* 1916, *and cannot be heard to say that she was unaware of such profits.*

She knew she was selling during the war, and when prices for mineral were high; her other information of the mine, its outlook, its property in the Smelter and Refinery, the ore in transit and the cash on hand have been heretofore shown.

VII.

GREENOUGH'S ESTIMATES: ORE IN TRANSIT; CASH ON HAND.

Counsel cannot, and do not attempt, to destroy the physical facts as testified to by Burbidge, relative to the size, length and number of ore bodies. But, as heretofore shown, these uncontradicted facts destroy Greenough's estimates, because he claims four (4) ore shoots, whereas there were only three; he ascribes lengths and widths to the supposed ore bodies which he measured as per timbering, whereas Burbidge gave the true size from physical measurements.

At the oral argument and in the reply brief, op-

posing counsel complain that we have made Greenough's true estimates less than Burbidge's estimates. This is necessarily true when the same length and width of ore bodies is taken as established by physical facts because Burbidge estimated a probable depth of 1900 feet below the Hummingbird Tunnel, whereas Greenough estimated 1600 feet only. It must necesarily follow then, that Greenough's estimates would be less than Burbidge's, when the same length and width of ore bodies are allowed both. Illustrative of this phase, it is plain that a timber which is one foot square and 19 feet long will contain more lumber than one which is one foot square and only 16 feet long.

So, when Mr. Greenough estimates four (4) ore bodies instead of three and ascribes erroneous lengths and widths to them, his calculations are based upon an impossible condition and hence are untrue; and likewise, if his ore bodies are scaled to the physical facts, his tonnage must be less than Burbidge's estimates, as Greenough takes an estimate of 1600 feet, whereas Burbidge takes a depth of 1900 feet.

Because we have scaled Greenough's estimates to the physical facts, it is urged that we are "figuring down" the values. The correctness of respondent's testimony on the number and size of ore bodies has

not been controverted.

ORE IN TRANSIT.

Opposing counsel persistently treat this as all profit and as cash immediately available. In their main brief at page 102, is a tabulated statement, made from the answers to the interrogatories of E. R. Day.

From this table it appears that the total net smelter returns from the entire mine were $20,972,610.00 and the total dividends were $9,981,227.00, up to October 28th 1916, the date of the sale. It thus appears that the dividends were a little over 47 per cent of the NET SMELTER RETURNS. But, the table does not show the cost of mining, nor any of the items that are necessarily spent in extracting the ore and preparing it for shipment; nor, is the income tax of 1916 deducted. When these items are also included in the deductions, it leaves an ESTIMATED DIVIDEND in the ore in transit of approximately $400,000.00 only, instead of the entire value as counsel have erroneously assumed.

Notwithstanding these plain facts, opposing counsel hold up the entire value of such ore in transit ($1,048,864.14) as all profit (and as practically cash in bank—though the ore is yet to be treated, purchasers found, sales made and money collected) hoping thereby to create the impression that the price

paid was not a fair valuation of the 1-16th interest sold.

Because we have shown that Mrs. Cardoner's 1-16th of the probable dividends in the Ore in Transit was $25,000.00, and have taken the present value of that sum based upon the undisputed testimony that ore in transit of that value will and must be, in transit to the estimated end of the mine's life (10 years) and have calculated such present worth on the rate of income testified to by Greenough, we are accused of a "figuring down" process, although our calculations are not challenged as incorrect. If plaintiff had remained a partner, her share of the ore in transit, must remain in transit and could not be had in cash. ,

CASH ON HAND.

In the settlement and sale, the ESTIMATE of cash on hand was $600,000.00. The cash balance was $649359.48, from which should be deducted the amount due the Northport smelter, to-wit, $278,-838.35, leaving a book balance of $370,521.13; which we have heretofore been content to treat as the cash. But the costs of operations must also be deducted from that sum. It is therefore seen that in the treatment of the item "CASH ON HAND," the respondents have been more than liberal with Mrs. Cardoner. That she was overpaid in this item, has not

been refuted by appellant's counsel.

The estimate of cash on hand at page 60 of the reply brief, as well as our own former estimates, omit the very large element of operating costs for the current month, which greatly reduce this item.

TONNAGE EXTRACTED—LIFE OF MINE.

Much time is spent in arguing about the tonnage and the future life of the mine.

In Burbidge's testimony (p. 903) we find:

> "From January 1st, 1907, to October 28th, 1916, a period of 9 years and 10 months, there was mined 1,650,849 tons of ore, an average of 167,888 tons per year. At the same rate of extraction the 1,575,600 tons in the mine as of October 28, 1916, would last 9.4."

In Greenough's testimony (pp. 1090-1091) we find:

> "The Court. Do you understand the question?
>
> A. Yes, that is assuming a rate of production as Mr. Burbidge stated of 167,888 tons, how long would it take to work out the tonnage. That would be thirteen and three-fourths years.

Again at p. 1100, Greenough says:

> Q. How many tons per annum did you figure on being produced there?
>
> A. Well, at the rate of production in 1916, which the mill apparently has the capacity to handle, up to the 10th day that would be at the rate of 400,000 tons a year.
>
> Q. I thought you said the mill had a capacity of 800 tons per day?
>
> A. No. I said 850 to 875 tons.
>
> Q. Now how many tons per annum would

that be?

A. That would be 310,500.

Q. 310,500?

A. Yes.

Q. Is that the rate that you figured that would be mined out?

A. I say I didn't figure a rate. But if you take the rate they are mining now and the capacity of their plant, which they did mine in 1916, and at that time, they did mine the tonnage I estimated, mine that out in 7.7 years.

Q. As the mine goes deeper into the earth they will be able to operate it as rapidly and withdraw the ore as rapidly as they did above that tunnel level? * * *

A. Certainly. They have shown an increased production every year and I have only assumed that it will only go 1500 feet.

Q. To the end of its life the production will be as rapid as it was during the last year in your judgment?

A. Not to the end of its life it wouldn't, but to depth it would. That is all I took in my assumption."

It was shown by the above testimony that Burbidge took the average tonnage as a basis upon which to estimate the future life of the mine; Greenough takes the capacity tonnage under war pressure and prices, and assumes that the mine will be operated at the tonnage capacity every day, to the end of its life. Again he makes no allowances for labor troubles, strikes, shutdowns, and the numerous and multiplied emergencies which arise in mining. Appellant's counsel fall into the same error in his calcula-

tions of present value, and "estimated" imaginary value of a property, which was and is 75 per cent speculative because the ore bodies were undisclosed. All the argument of opposing counsel accentuates the point heretofore made that mining property is speculative and problematical in value, always, and that persons who deal with such property calculate their chances of value, taking into consideration the PROBABLE existence of dikes, faults, and geological faults; of labor troubles, shut-downs, depreciation of mineral content, failing markets, transportation difficulties and all and every kind and manner of loss, wastage and depreciation involved in that complex and knotted phase known as a "miner's chance."

Although opposing counsel concede that 52 per cent of the mine was worked out on October 28th, 1915 (reply brief p. 68, sub-paragraph (9) ; and page 71, sub-paragraph (1)) which yielded only 1,575,600 tons of crude ore (reply brief sub-paragraph (9)) yet they persistently argue that Greenough's *estimate* of 2,210,000 tons (reply brief page 63, sub par. (d) is correct. But if 1,575,600 tons is 52 per cent of the mine content, it is necesarily true that 48 per cent cannot be 2,210,000 and the calculations of Greenough and appellant's counsel are palpably erroneous.

VALUE FURTHER CONSIDERED.

At the oral argument and in the reply brief (p. 73) counsel stress two facts and conclude that the value of the mine is $10,000,000.00.

Their argument is:

(a.) That the mine was paying $3,000,000.00 annually on October 28th, 1916.

(b.) That Burbidge said the life of the mine was 9.4 years.

But if these premises are correct, or if we take 10 years as the life of the mine as estimated by the Days and argued in the original brief, the premises show a valuation of $30,000,000; however, opposing counsel have not the temerity to argue the conclusion which their non-congenial premises force. They claim a valuation of $10,000,000.00, on premises which if true, would force a conclusion of $30,000,000.00,

Wherein, then are their premises false. In the items noted as follows:

(a.) The profits of 1916 and every war year, were based upon WAR or BOOM prices and upon an urged and urgent capacity production which we have shown to be far in excess of the average or ordinary production; and overlooking increasing war costs and taxes and assuming, wholly underground conditions concerning which nothing is known.

(b.) The time (9.4) years is predicted upon Burbidge's statement, based upon the average production.

The fallacy and defects in the argument arise from the fact that at the rate of production (sufficient to yield $3,000,000) per year, calculated at the extreme war prices the tonnage extracted would exhaust the mine in less than five (5) years, and the continuance even during the five years is based only on assumption and not on knowledge or proof.
(Appellant's original brief page 91.)

The profits estimated in this period are war-profits, and were at an end when the armistice was signed; they were impossible even when appellant's original brief was served (1-30-1919) and when the reply brief was written. Notwithstanding these cold facts, appellant strongly insists that those prices ought to have been taken by E. R. Day when buying this property and because he did not do so, he has perpetrated a fraud.

We quote from appellant's original brief, p. 88:

> "The contention that during the year 1916 abnormal prices obtained on account of the European War and should therefore be excluded, is not according to either reason or engineering judgment for the reason such conditions actually existed at the time and in so far as human judgment could discern, would continue for at least a reasonable time in the future. It is a matter of public knowledge that it was the general impression on that date that the war would not end for some years."

Again at page 89:

> "This is a fair basis as the mine was sold *at the very apex of high prices*, and it could be well assumed that the average of the previous sixteen years would prevail for the next ten years."

This argument, in view of the facts that the Armistice was signed in November, 1918, and the brief of counsel was not served until January, 1919, and of the further facts concerning the close of the war and hence the end of war prices, lacks but little of being fatuous.

The evidence of Burbidge given while the war was still raging, shows that he appreciated the calamatous break in prices and the business and financial condition which was bound to follow the cessation of hostilities. Guggenheims conservatism on renewal of smelting and purchasing contract shows they realized it. Harry L. Day says he took the matter of the World's war into consideration, in determining whether to go into the deal or not. It is hardly proper, we submit, to base a charge of fraud and deceit on far-sighted conception of financial policies, directly caused by cataclysms in human affairs.

At page 73 of reply brief, appellant says:

> "We believe that it is not possible to say that the appellees have proven the mine to be worth less than $10,000,000.00. We further believe that by a fair preponderance of the testimony we have shown the value of the Hercules Company's property to be worth over $10,000,000.00."

This conclusion ignores the uncontradicted testimony of Burbidge, Paulsen and Hutton; the refusal of E. R. Day to pay more than he did, and his statement of Allen to offer it to any one else, that he was "done"; the testimony of E. R. Day, Harry L. Day and Jerome J. Day as to their valuation based upon their knowledge of the mining man's "chance"; the advice of Allen, Judge Woods and the impossibility of Greenough's imagined ore bodies. Every foot in further depth was simply a guess as to ore continuity. There is no evidence as to what depths will show.

This question of value was thoroughly considered by the trial court. Mrs. Cardoner sought to force a higher price by a threatened sale to the strongest competitor which the Days had, at a time when she knew the World's war was on, and when prices were —(Appellant's original brief p. 89—"in the very apex of high prices"—thus demonstrating her shrewd cunning and resourcefulness, as found by the trial court.

Two very great, vital factors are ignored by the plaintiff, viz.:

(a) The great loss which occurs to the owners at the end of operation of any great mine. The operation of the mine depends on speculation each day as to the continuity of the vein and its ore content. After many years of great success, the owners, who

have from time to time taken the chances on vast expenditures, for new tunnels, shafts, processes and machinery, and for discovery of new ores and been successful so often, will not incline to give up and abandon the mine and its equipment, when the ore is finally exhausted forever, until they have suffered a great loss, from vast expenditures in seeking, as they did successfully, many times before, to find pay ore again. The owner who quit and sells out escapes that loss.

(b) The owners faced three alternatives (1) A new smelting and sale contract with Guggenheim interests at rates considered intolerable, (2) Building their own smelter and refinery and securing purchasers in competition with Guggenheims or (3) Closing the mine.

The Guggenheim contract, offered, represented their view of future values. If their view was sound, the Hercules owners will not be able to smelt, refine and sell for any more than Guggenheims offered. All plaintiff's contentions as to value involve the proposition that Guggenheims, did not know what they were doing, and that they were ignorant of bright prospects, plaintiff claims will continue, in the metal market. E. R. Day told plaintiff he believed the ore would be good and that the smelting, refining and selling plan would win and while she

did not and would not believe it, then, her representatives now reverse about, and say, yes prices will be better even than defendants expected--not mentioning increased costs, and claim to have established to a certainty, cash value of entirely unexplored depths, value of which, even if found, depends on equally unexplored future costs and markets.

Respectfully submitted,

JAMES E .BABB,
Lewiston, Idaho,
Attorney for Harry L. Day.

ISHAM N. SMITH,
Wallace, Idaho,
Attorney for Jerome J. Day.